Re ABDULLAH'S APPLICATION

[O.C.J. (Adams J.) December 2, 1961]

[Muar — Originating Motion No. 8 of 1961]

Practice and Procedure — Surety for judgment debt and costs — Costs taxed without notice to surety — Whether bound by certificate of taxed costs — Meaning of "party" in R.S.C., 1957, O.65 rr.16, 17 and 27(39) — Motion in proceedings or by originating motion.

In a money lending action where the defendant was ordered to pay into Court, or give security for the judgment debt, the applicant in this originating motion signed the bond as surety. The bond he signed was, however, for the sum claimed and for costs. In due course, the costs were taxed without notice of taxation of the bill being served on the surety.

On a question whether applicant was liable to pay the taxed costs in his capacity as surety,

Held: (1) the applicant on the facts of this case became a party within the meaning of O.65 r.27(39) from the moment he signed the bond. As a party he should have been served with the notice. The effect of the omission to serve notice on the applicant was that the costs certified could not be enforced against him;

(2) the matter should have been brought before the Court not by way of an originating motion but by way of a motion in the action. The originating motion was therefore dismissed.

Cases referred to:—

(1) *Charlton* v. *Charlton* [1882] W.R. 227.

(2) *Re Clark's Settlements* [1911] 55 Sol. J. 293.

(3) *Re Furber* (1889) 42 Sol. J. 613.

ORIGINATING MOTION.

A. Muthuswamy for the applicant.

W. H. Sault for the respondent.

Cur. Adv. Vult.

Adams J.: This is an originating motion to set aside the certificate of an allocatur in respect of the taxed costs in *Prem Singh* v. *Haji Musa bin Abu Bakar* — Muar Civil Suit No. 33 of 1955 together with a prayer for liberty to carry in objections before the Assistant Registrar to two bills of costs taxed in the suit abovenamed.

Unfortunately there has been a considerable confusion in the proceedings leading up to the institution of present originating motion which has not been helped by the lack of any books of reference on the question of taxation nearer than the Supreme Court Library in Singapore. But I do not think it will be necessary to go into the false starts that have been made ending with the present originating motion. But it will be necessary to go into this matter at some length.

The respondent to this motion was a money lender who instituted proceedings against the defendant Haji Musa bin Abu Bakar for a sum of $2,060 and costs. Certain interlocutory matters took place which are not relevant but on the 4th of February, 1956, Storr J. made an order *inter alia* that the defendant pay into Court or give security for the sum claimed within one month of the order. It will be noted that the words used are "give security for the sum claimed". Apparently it was arranged between the defendant and the present applicant Abdullah bin Mohamed that the applicant should stand surety pursuant to the order of 4th February and on the 3rd of March, 1956, he executed a bond. The applicant says that he had no idea of what this bond really meant; that it was arranged entirely by the defendant's solicitors Messrs. Mitra & Co.; and that he was told that he was standing surety for the sum claimed and costs which would amount to not more than $500. It was accepted by Hepworth J. in a judgment given on the 8th March, 1959, that the plaintiff had nothing to do with the drafting of the bond. That the surety may have been misled is quite likely in view of the fact that although Storr J. only directed that security be given in respect to the sum claimed the unfortunate surety was persuaded to sign a bond not only for the sum claimed but for the costs also and it was because of the wording of that bond despite the order of Storr J. of 4th February, that Hepworth J. held that the plaintiff was entitled to enforce the bond and that the surety was liable for the sum of $2,060 and taxed costs. Notice of taxation of the bill of costs in the action in accordance with the Order 65 Rule 16 was sent to the defendant's solicitors. No notice of taxation was sent to the surety and indeed the surety does not appear to have been legally represented until 1958 whereas taxation took place at the end of 1957.

On the 22nd of May, 1961, a writ of seizure and sale was issued against the properties of the surety. The amount claimed to be enforced by the writ was $10,364.44 although the amount originally claimed of $2,060 had already been paid into court. The sum stated in the writ of seizure included costs of proceedings in the Court of Appeal and interest although Hepworth J. already held that all the plaintiff was entitled to enforce against the surety was the sum claimed of $2,060 and the costs of the original action.

By this time the present applicant had instructed Mr. Muthuswamy who took out summons in chambers returnable on the 28th of June, 1961, praying *inter alia* that the seizure and sale be set aside for certain other reliefs which are not now relevant. Mr. Muthuswamy asked leave to amend his application and this was done adding to the prayer for setting aside of the seizure and sale a prayer that bills of costs be reviewed and at the same time he supported this with an affidavit sworn by the surety and sought to file what purported to be objections made under Order 65 Rule 27(39). It was this application which started a series of errors which culminated in the present originating motion.

In the present proceedings Mr. Sault made two short points: (i) that if the surety wishes to have the order of taxation reviewed (always assuming that he can do so which is doubtful) he should have proceeded by motion in the action, and (ii) that on the authority of *Charlton* v. *Charlton*[1] the proper procedure, was for the surety to move to have the order of taxation set aside since he is not a party to the proceedings. I then adjourned these proceedings so that I could have an opportunity to go into the matter and

read the report in *Charlton's case* as it is only available in Singapore.

Charlton v. *Charlton* decided that a person who is not a party to the making of an order in the taxation of costs and desires that the taxation order may be reviewed ought not to apply by motion to review the taxing master's certificate but ought to apply to have the order of taxation set aside. Unfortunately the judgment of Fry J. is very short. He apparently criticised the procedure adopted. But unfortunately for me what the procedure adopted had been is not set out. However he held that the proper procedure should have been an application to discharge the order for taxation and payment as having been made in the absence of one of the parties to the fund. The very brief facts in *Charlton's case* were that the beneficiaries to a fund took out an order for the administration of the estate against the trustees thereof. The tenant for life claimed considerable sums due to her in the administration. The tenant for life died but before the administration to her estate could be taken out an order for taxation was made in the main administration action. As there were no personal representatives to her estate her estate was not represented at the taxation. It appears therefore the learned Judge was of the opinion that as there had been a miscarriage of justice there would be valid grounds for setting aside the order for taxation and payment because there were no personal representatives to the estate of the tenant for life at the time the order of taxation was made and therefore the estate was not a party to the proceedings.

There does not seem to be any definition of "any party" under O. 65 r. 27(39). *Re Clark's Settlements*[2], is authority, I think, for holding that the words "any party" should have a wide meaning. In that case a widow was a tenant for life with restraint upon anticipation. In 1898 she took out a summons to remove the restraint to enable her to raise a fund to pay her debts. Her solicitors were Messrs. Goddard & Co. An order was duly made under which a fund of £12,000 was raised and it was ordered that the costs of the proceedings should be taxed as between solicitor and client. In 1907 the fund was in the hands of the distributors when the widow changed her solicitors. On the 12th of October, when the bill came to be taxed the taxing master refused to consider Messrs. Goddard & Co.'s objections on the ground that the objections had not been brought in by the applicant for taxation and therefore they were not entitled to object because they were not a party. Joyce J. however held that they were parties because they had a lien on the fund for their costs, in the first place because by their exertions they had raised the fund and secondly because their bill was ordered to be taxed. He held that since their objections appeared to be good there would be a miscarriage of justice and in the circumstances they were entitled to be considered parties. The taxation in truth stood between Messrs. Goddard & Co. and the applicant, who was represented at the taxation by her new solicitors. The question here therefore is whether or not the surety was a party within the meaning of O. 65 r. 27(39). I think he was. *Charlton's case, Re Clark's Settlements* and a further case of *Re Furber*[3] show that what influenced the mind of the Court was the fact that if nothing was done there would be a miscarriage of justice. Indeed in *Furber's case* the Court of Appeal (Lindley M.R., Chitty and Collins L.JJ.) upheld the action of Kekewitch J. who, on an appeal against the order of the master dismissing a summons to vary the certificate of taxation on the grounds that the applicant was too late as he had not previously objected to disallowance of his charges, had made an order setting aside the certificate and directing that it be re-signed at a later date to enable the solicitor to carry in his objections. Lindley M.R. said that the order must be left alone as it was substantially correct. There had obviously been a blunder and a miscarriage of justice.

It is a principle of natural justice that before a person can be condemned in any way he should have been given an opportunity to be heard. If the unfortunate surety is not to be considered a party it means that he is to be deprived of his right which is provided for in the Rules of the Supreme Court to object to items in the bill of costs the payment for which he stands surety. There would be a miscarriage of justice if this were in fact so. After all he provides the fund from which, if the plaintiff cannot enforce the judgment against the defendant, he seeks to reap the benefits of the judgment. I think therefore that the surety in this case became a party within the meaning of O. 65 r. 27(39) from the moment he signed the bond. The next question therefore is should he as a party have been served with notice of taxation under O. 65 r. 16 and I think that he should have been so served. It is quite true that O. 65 r. 17 provides that notice of taxing costs shall not be necessary in any case where the *defendant* has not appeared in person or by his solicitor or guardian. The surety is not a defendant and the wording of r. 16 makes it mandatory to give notice "to the other party or his solicitor". Since in this case it was quite obvious at the beginning of the proceedings in which security was sought by the plaintiff that the defendant was unlikely to be able to satisfy the judgment and that recourse would have had

to the surety he should have been given notice of taxation but he has not been so given and the effect of that omission in my opinion is that he is not bound by the certificate of the Assistant Registrar and that the taxed costs certified under that certificate cannot be enforced against him.

That, it appears to me is how the position now stands. There was in fact no need for this motion, and if there had been, as Mr. Sault pointed out it should have been by motion in the action and not by way of an originating motion. I would also draw attention to the fact that the originating motion is not addressed to anybody, nor is it properly intituled or expressed to be between any party.

The motion must be dismissed but I make no order as to costs. I think that the plaintiff by his failure to give the surety notice of the taxation has been responsible for causing the difficulties that have arisen.

Order accordingly.

Solicitors: *Muthu & Co.*; *W. H. Sault.*

CHOW YOONG HONG v. CHOONG FAH RUBBER MANUFACTORY

[P.C. Lord Denning, Lord Devlin and Mr. L. M. D. de Silva) December 4, 1961]

[Privy Council Appeal No. 53 of 1960]

Money and Moneylending — Two series of transactions — Post-dated cheques — Purchase of cheques at discount with post-dated cheques as collateral security — Whether money-lending transactions — Moneylenders Ordinance, 1951 — What constitutes "interest" in section 2 — Discussion on s.3.

The plaintiff was a wholesale dealer in textiles and defendants manufacturers of rubber shoes both having businesses in Kuala Lumpur. In the course of his business the plaintiff, from time to time, received outstation cheques from his customers which took several days to clear and on which he could not draw till they were cleared. The defendants had a special arrangement with their bank under which, for a special charge, they were allowed to draw on the credits of such cheques at once. Since 1954 plaintiff and defendants had worked on an understanding whereby plaintiff endorsed over to the defendants his out-station cheques and the defendants gave him their own cheque in exchange.

On February 17, 1958 the plaintiff gave to the defendants fifteen out-station cheques and defendants gave him their cheque for the total amount but post-dated February 24, 1958. Between February 21 and 28 there were seven other similar transactions. In each case the plaintiff was given a cheque post-dated by about a week. In respect of these latter transactions it was alleged by the defendants that the plaintiff had, in fact, purchased their out-station post-dated cheques, charging them interest and that they had additionally given their own cheques as collateral security.

The cheques of the defendants in the hands of the plaintiff having been dishonoured, the plaintiff brought an action for the recovery of $31,112.06 which was the total amount of the cheques.

The only defence put forward was that the transactions were money-lending transactions and that as there was no compliance with sections 15 and 16 of the Moneylenders Ordinance, 1951, in that plaintiff was not licensed as a moneylender and there was no memorandum in writing, the contracts in pursuance of which the cheques given were unenforceable.

In the High Court Ong J. gave judgment for the plaintiff.

The Court of Appeal reserved this decision and found for the defendants.

On appeal to the Privy Council by the plaintiff.

Held: (1) in respect of the first group of transactions there was no excess charged. But even assuming that an excess was charged, to prove that the transaction was a moneylending transaction the excess must fall under the definition of "interest" in section 2 of the Moneylenders Ordinance being "any amount by whatsoever name called in excess of the principal payable or paid to the moneylender in consideration of or otherwise in respect of a loan." As no loan was proved, the excess could not be interest as defined and the transaction was not therefore a moneylending transaction;

(2) in respect of the second group of transactions, even accepting the evidence of the defendants as to their nature all that was disclosed was a group of transactions amounting to purchase of bills at a discount. Such transactions are distinct from moneylending transactions and designating discount as "interest" cannot alter their nature. Similarly, the fact that a purchaser of bills is usually a bank or a discount house or that the cheques were post-dated did not affect the nature of the transactions.

Section 3 of the Moneylender's Ordinance 1951 discussed and explained.

Cases referred to:—

(1) *Olds Discount Co. Ltd.* v. *John Playfair Ltd.* [1938] 3 All E.R. 275.

(2) *Sadhu Singh* v. *Sellathurai* [1955] M.L.J. 117.

PRIVY COUNCIL APPEAL.

W. W. Stabb for the appellant.

E. F. N. Gratiaen Q.C. (Ceylon) and *J. A. Baker* for the respondents.

Cur. Adv. Vult.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by,

Lord Devlin: This is an appeal from a judgment of the Court of Appeal at Kuala Lumpur setting aside an order of the High Court that the defendants, the present respondents, should pay the plaintiff, the present appellant, the sum of $31,112.06 in respect of dishonoured cheques drawn by the defendants and payable to the plaintiff.

The plaintiff and the defendants carry on business at Kuala Lumpur, the one as a wholesale dealer in textiles and the other as a manufacturer of rubber shoes. Their dealings together, which they have had since 1954, appear to have been financial rather than commercial and arose, perhaps, from the fact that the defendants' cashier was the plaintiff's nephew. In this action the plaintiff is suing the defendants on sixteen cheques drawn by the defendants in February and March, 1958, in favour of the plaintiff and on presentation dishonoured.

The cheques were given to the plaintiff in the course of certain transactions whose nature it is necessary to investigate and determine.